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No. 82-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,
Petitioner,

v.

TRAILWAYS, INC., *et al.*, and
NATIONAL TRAILWAYS BUS SYSTEM,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the court of appeals, holding arbitrary and capricious the Interstate Commerce Commission's failure to receive evidence relating to and make adequate findings on the issue of the anticompetitive systemwide harm likely to result from a grant of Greyhound's application to provide new intercity bus transportation, merits this Court's review.

LISTING REQUIRED BY RULE 28.1

Trailways, Inc., a privately held corporation, controls twenty wholly owned subsidiaries which have no affiliates. It has partial ownership of the following corporations:

Amarillo Trailways Bus Center, Inc. (50%)
Continental Panhandle Lines, Inc. (50%)
K.G. Lines, Inc. (Preferred, 100%; Common, 50%)
Texas, New Mexico & Oklahoma Coaches, Inc. (38.96%)
Union Bus Station of Oklahoma City (20%)

Trailways' parent, New Trails, Inc., has partial ownership of the following corporations:

Charlotte Union Bus Station, Inc.
(Trailways Southeastern Lines, Inc., 75%)
Service Coach Line, Inc.
(Virginia Stage Lines, Inc., 33⅓%)
(Trailways Tamiami, Inc., 33⅓%)
Trailways Bus Depot of Columbus, Inc.
(Trailways Tennessee Lines, Inc., 25%)
(Trailways Tamiami, Inc., 50%)
Trailways Bus Terminal, Inc.—Richmond
(Virginia Stage Lines, Inc., 50%)
Wilmington Union Bus Station Corporation
(Trailways Southeastern Lines, Inc., 30.46%)

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GREYHOUND LINES, INC.,
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NATIONAL TRAILWAYS BUS SYSTEM,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case involves a decision of the United States Court of Appeals for the District of Columbia Circuit holding that the Interstate Commerce Commission ("ICC" or "Commission") failed to make adequate findings to support its decision to grant the application of Greyhound Lines, Inc. ("Greyhound"), for new, direct-bus service to and from Little Rock, Arkansas, over a route served by Arkansas Motor Coaches, Ltd. (now "Trailways Arkansas, Inc."), a Trailways subsidiary.[1] The Little Rock

[1] Trailways, Inc., and its 14 wholly owned bus subsidiaries, together with approximately 49 independent bus companies, constitute the National Trailways Bus System ("NTBS"), which serves 46 states. NTBS intervened in the review proceeding below.

application was one of a series of six applications which, beginning in 1977, Greyhound filed for new regular-route authority involving Trailways' most vulnerable routes.[2]

Respondents Trailways, Inc., *et al.*, filed a protest to the application, and the Commission ordered the submission of written evidence under its modified procedure.[3] In a verified statement, Trailways' Vice President of Traffic testified that traffic diversions resulting from a grant of the application would "seriously harm protestants" (Petitioner's Appendix, hereinafter "Pet. App.," 101), would "adversely impact" other carriers systemwide (Pet. App. 104), and would permit Greyhound—by far the nation's dominant bus carrier—to become larger at the expense of Trailways, its "distant" competitor (Pet. App. 104-05).

On February 8, 1980, a three-member staff review board (one member not participating) issued a decision granting the Greyhound application. Pet. App. 34. The review board found that the involved traffic "constitutes a considerable part of [Trailways] Arkansas' operations" (Pet. App. 39), but held "we are unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely affect either Arkansas or its parent, Trailways" (Pet. App. 39-40).

Trailways petitioned for administrative review by filing timely "exceptions" on March 10, 1980, and subsequently

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[2] On Trailways' motion, the Commission consolidated four of the subject applications (not including Little Rock) for further hearing "with respect to the issues of the structure of the national motorbus industry and Greyhound's dominance of that industry . . . and its competitive structure nationwide." (Joint Appendix to the briefs before the court of appeals, hereinafter "J.A.," 260.) Following an unsuccessful challenge to the Commission's consolidation order (Greyhound Lines, Inc. v. United States, D.C. Cir. Nos. 81-1079, 81-1169, *appeal dismissed*, May 1, 1981), Greyhound unilaterally withdrew the four applications, and the Commission thereupon discontinued the consolidated proceeding.

[3] Virtually all motor carrier licensing cases are handled under this modified procedure, pursuant to which the parties submit written verified statements in lieu of oral testimony. *See* 49 C.F.R. § 1100.251(c) (1981).

tendered a motion to supplement its exceptions with newly available evidence amplifying the impact that a grant of this application would have on Trailways' systemwide operations. J.A. 158.[4]

On June 17, 1980, a three-member Commission panel ("Division 1") issued a final decision which affirmed the review board's grant of Greyhound's application. Pet. App. 30. The Commission specifically held that Trailways' evidence concerning potential anticompetitive systemwide harm "may not be considered, for this issue was not raised prior to the time this proceeding reached the petition stage." Pet. App. 32. In addition, the Commission denied Trailways' request that the Commission take official notice of its comments filed in the pending MC-133 proceeding, holding that the agency "may not give consideration to evidence contained in the records in those proceedings." Pet. App. 31.

On June 27, 1980, Trailways filed a petition for review with the District of Columbia Circuit. A stay pending judicial review was entered by Chief Justice Burger on July 1, 1980 (J.A. 201), but subsequently was vacated on Trailways' own motion when it was learned that the Commission had entered a stay of its decision late that same day (J.A. 309).[5]

In a unanimous decision issued March 16, 1982, the court of appeals found that the Commission's grant of the Greyhound

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[4] In its exceptions, Trailways specifically requested that the Commission take official notice of certain comments which it had recently filed in another pending Commission proceeding—Ex Parte No. MC-133, Petition for Rulemaking on Entry Flexibility for Regular-Route Passenger Service (Pet. App. 77)—involving the competitive structure of the bus industry. J.A. 78. It further requested that the Little Rock application be considered along with the five others previously described as evidence of Greyhound's "continuing movement toward monopolization of the industry by selectively negating or neutralizing advantages held by petitioner [Trailways], its largest rival." Pet. App. 31.

[5] Petitioner incorrectly states the date of Trailways' petition for review as "March 27" (Petition for Writ of Certiorari, hereinafter "Pet.," 5), and ignores the prior involvement of this Court in the proceeding. On September 2, 1980, the Commission lifted its stay (J.A. 210), and on September 16, 1980, a second interim stay previously entered by Chief Justice Burger was vacated and a stay pending judicial review was denied (J.A. 256).

application was arbitrary and capricious because it was "made without sufficient consideration of important relevant issues." Pet. App. 2.

Although the court of appeals was "mindful of the broad expert discretion traditionally lodged in the ICC in considering and ruling on common carrier applications for authority to provide a particular service," it emphasized that this discretion "is not without limits." Pet. App. 7.[6] Although the Commission conceded that it was required to focus on the systemwide effect of competition on Trailways' operations, the court found the Commission's decision was bereft of "articulated explanation" or even "any discussion" of its finding on this issue.

> If the Commission is to be true to its duty in cases of this sort to balance convenience to the applicant and any adverse impact or injury to the public as a whole, the harm inflicted by a monopolist or a near monopolist on a vulnerable competitor, which Trailways claims to be, deserves especially careful attention. It received none in this case. We find in this failure alone sufficient reason to declare the Commission's ultimate conclusions and its decision arbitrary and capricious and to order that this matter be remanded for reconsideration.

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[6] It is the duty of the Commission, the court noted,

> to identify and balance often competing interests in promoting competition, maintaining healthy economic conditions, preserving an adequate existing service, and providing for future needs, and to arrive at a decision that best serves the public interest. It is not for us to say what weight ultimately should be afforded the various elements of the Commission's balance in determining "public convenience and necessity." That is a determination of fact which is the prerogative of the ICC, and it is not this court's role in the administrative arena to dictate an outcome or to reverse an agency's decision simply because we may not agree with it. It is our duty, however, to ensure that the Commission has confronted all relevant—or at least significant—factors necessary to a reasoned decision.

Pet. App. 8 (footnotes omitted).

Pet. App. 18. The court of appeals vacated the order under review and remanded the matter for "deliberations which the Commission deems appropriate to a full consideration of market-related issues, and any others pertinent to the action requested." Pet. App. 23. Greyhound's petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 25-27) was unanimously denied.

SUMMARY OF ARGUMENT

The District of Columbia Circuit found that the ICC failed to make adequate findings with regard to the potential anticompetitive systemwide harm caused by the grant of the Greyhound application. This decision of the court of appeals does not, and indeed could not, give rise to any conflict among the circuits because the court simply found that on the basis of the specific facts presented, the ICC acted arbitrarily and capriciously. The standards employed by the court of appeals in determining whether the agency's decision was based on a consideration of all relevant factors are the same standards announced by this Court, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and utilized in each of the other circuits.

The record clearly supports the decision of the court of appeals that the ICC was plainly wrong in finding that the issue of systemwide anticompetitive harm was not raised before the review board. Similarly erroneous was the Commission's finding that it could not lawfully consider evidence contained in the records of other ICC proceedings. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946).

Finally, the court of appeals did not infringe upon areas committed to the ICC's discretion. Instead, the court simply required that the agency properly consider on remand long-established standards regarding whether or not the grant of Greyhound's authority would serve the public convenience and necessity.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND THAT OF ANY OTHER COURT

Petitioner broadly alleges the existence of a conflict between this decision of the court of appeals and decisions of the Third,[7] Fifth[8] and Seventh[9] Circuits.[10] Pet. 7-8. In fact, the decision of the court of appeals conflicts with none of the cases referred to by petitioner.[11]

Petitioner alleges that Trailways made these "same contentions" to the ICC in the *Lincoln* proceeding. In *Lincoln*, Trailways did argue that the ICC failed to make adequate findings with regard to the potential harm the grant of a Greyhound application would cause to Trailways on a system-wide level. There, however, unlike the situation in the instant case, the ICC accepted and evaluated all of the evidence

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[7] Trailways, Inc. v. ICC ("Atlantic City"), 659 F.2d 1071 (3d Cir. 1981) *(mem.)*.

[8] Trailways, Inc. v. ICC ("Lincoln"), 676 F.2d 1019 (5th Cir. 1981) (*per curiam*).

[9] Assure Competitive Transp., Inc. v. United States ("Assure II"), 635 F.2d 1301 (7th Cir. 1980).

[10] Petitioner adds the make-weight contention that the decision below conflicts with the District of Columbia Circuit's own decisions in Greyhound Corp. v. ICC, 668 F.2d 1354 (D.C. Cir. 1981), and Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977). In those cases, Greyhound sought review of ICC orders that refused to rescind prior orders of the Commission that subjected Greyhound's holding company to ICC securities jurisdiction because, at the time of those orders, 80% of Greyhound's total revenues were derived from regulated transportation activities. The court of appeals held that the Commission improperly applied a new test for the continued assertion of its securities jurisdiction to Greyhound. The court of appeals remanded the matter to the Commission for reconsideration in light of the ICC's traditional test for the exercise of its securities jurisdiction, and to give the Commission the opportunity to provide adequate reasons for its departure from its established precedents. These decisions quite obviously do not conflict with the decision of the court of appeals under review.

[11] Petitioner raised these identical arguments in its Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed April 15, 1982, in the court of appeals, and the entire court of appeals, without dissent, properly rejected petitioner's urgings.

tendered by Trailways on the issue. Moreover, in *Lincoln* the ICC addressed the issue of systemwide harm within the confines of that proceeding, finding that "[t]he economic data presented by protestant are not sufficiently persuasive to enable us to determine that a grant would have a substantial material impact upon protestant's operations and its ability to serve the public." Pet. App. 43. Although Trailways disagreed with the ICC's conclusion in that case, the Fifth Circuit, in its *per curiam* opinion, found that "the board's opinion and findings disclose that it adequately considered and made findings on the systemwide issue, *as raised by Trailways in the hearing before the board.*" *Id.* (emphasis in original).

By contrast, in the present case, the court of appeals found that the review board, and later Division 1 of the Commission failed adequately to consider the issues of systemwide harm and long-term anticompetitive impact that likely would result from the proposed expansion of Greyhound's authority, even though those issues were properly raised before the Commission. Pet. App. 30. Indeed, the Commission rejected Trailways' supplemental evidence on this issue—contrary to its acceptance of that data in *Lincoln*—and erroneously held that it had no power to consider additional evidence of anticompetitive systemwide harm properly before it. Thus, the basis for the court of appeals' finding that the Commission acted in an arbitrary and capricious fashion in the case at bar simply was not present in *Lincoln.*

Similarly, there is no conflict between the opinion of the court of appeals here and the action of the Third Circuit in *Trailways (Atlantic City), supra* note 7, dismissing (without opinion) Trailways' petition for review of an ICC order which permitted Greyhound to offer new service to Atlantic City, New Jersey. Unlike the situation here, the Commission in *Atlantic City* subsequently did not refuse to accept evidence properly tendered to it on the issue of systemwide anticompetitive harm, and the agency thoroughly addressed this issue in its final decision. *Greyhound Lines, Inc., Extension—Special Operations, Atlantic City,* MC No. 1515 (Sub.-No. 222) (Aug. 26,

1980). In *Atlantic City*, as the Commission embarked upon an analysis of the factors relevant to Greyhound's application, it emphasized:

> [Greyhound's] size and resources alone mean that it has a much greater potential impact on the competitive structure of any given market than a small carrier could possibly have.... Here a large applicant such as Greyhound has resources in equipment, operating ability, and advertising exposure, for example, which are potentially sufficient to overwhelm competing carriers in the short term and thus endanger the long-term competitive balance in any given market. While these considerations would by no means justify an automatic denial of Greyhound's application, they do establish ample grounds for subjecting this application to closer scrutiny than those of smaller carriers. Therefore, it is appropriate that we analyze carefully the probable impact of applicant's proposed operations upon the competitive standing of all of the protesting carriers.

Slip op. at 17-18. Accordingly, the Commission analyzed the potential anticompetitive systemwide impact in its 47-page, *en banc* opinion in *Atlantic City*, and the dissenting opinions of Commissioners Stafford and Gilliam further ventilated that issue. That treatment stands in sharp relief to the cursory rejection of the issue here, in which the Commission panel simply concluded that "[Trailways'] representations concerning potential systemwide harm may not be considered." Pet. App. 32.

Thus, the crucial factors that persuaded the District of Columbia Circuit that the Commission had acted in an arbitrary and capricious fashion were missing in *Atlantic City*. Indeed, the Third Circuit simply affirmed the ICC's action without opinion.

Finally, petitioner argues generally that the decision of the District of Columbia Circuit is somehow contrary to the decisions of the United States Court of Appeals for the Seventh Circuit in *Assure Competitive Transportation, Inc. v. United*

States, supra note 9 (*"Assure II"*), and *Assure Competitive Transportation, Inc. v. United States* (*"Assure I"*), 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). In those cases, the Seventh Circuit denied petitions for review of the Commission's decision modifying the criteria for deciding route application cases. None of the issues facing the court in the case at bar was in any way implicated in the Seventh Circuit's decisions. Indeed, the District of Columbia Circuit, in its opinion in this case, recognized the validity of the modified criteria established by the Commission and approved by the Seventh Circuit, and specifically found that the Commission did not meet these standards with respect to Trailways. Pet. App. 18. In no way, therefore, does the decision of the court of appeals conflict with those of the Seventh Circuit in *Assure I* and *Assure II*.

In this case, the court of appeals found that Division 1 of the ICC failed adequately to address certain significant issues and evidence squarely and properly before it. Therefore, the Commission's precipitous decision on those issues was arbitrary and capricious. The court's decision was based entirely on the facts of this case, and the standards employed by the court in assessing those facts are not in conflict with the standards utilized by any other circuit.

II. THE REMAND OF THE COMMISSION'S DECISION BY THE DISTRICT OF COLUMBIA CIRCUIT WAS WITHIN ITS SCOPE OF REVIEW

A. The Court of Appeals Properly Found the Commission's Decision To Be Arbitrary and Capricious

The court of appeals correctly found that the ICC's decision was arbitrary and capricious because it failed to disclose that it had confronted all of the relevant issues.[12]

[12] The decisions of this Court clearly instruct that, under the arbitrary and capricious standard, *see* 5 U.S.C. § 706(2)(A)(E) (1976), a reviewing court is required to conduct a probing review of an administrative action to determine "whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *See* Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971).

Indeed, the Commission's failure to reach a reasoned decision in this case resulted directly from its own erroneous view of the scope of its authority to receive and consider evidence submitted to it. These errors necessarily undermined the integrity of the Commission's conclusion concerning an important relevant issue—the injury that a grant of Greyhound's application likely would cause to Greyhound's competitors.[13]

1. The agency's decision does not clearly reveal whether the Commission adequately considered the issue of potential systemwide harm

Petitioner apparently has abandoned its contention that the issue of potential systemwide harm was not a relevant factor in this case.[14] Neither does it continue to assert that the Commission "was in fact correct" in its finding that this important issue was not properly raised by Trailways.[15] Rather, petitioner now contends that Trailways did not present sufficient evidence on the issue of anticompetitive systemwide harm to meet its burden of proof in this case. Hence, it argues that the court of appeals' decision ignored Trailways' burden of proof and, in doing so, improperly intruded into an area of ICC policymaking discretion.

Petitioner offers a totally skewed reading of the court of appeals' decision. Although Trailways contended that it satisfied its burden of proof on the systemwide harm issue,[16] the court of appeals did not hold that Trailways had proved its case

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[13] The Commission's statutory co-respondent, the United States of America, refused to support the agency's orders before the court of appeals. The Government has not sought further review.

[14] *See* Brief for Intervenor-Respondent Greyhound Lines, Inc., dated July 8, 1981, at 18. The Commission, by contrast, conceded below that "the effect that a grant of authority would have on other carriers' overall operations" must be considered. *See* Brief for the Interstate Commerce Commission, dated August 5, 1981, at 23 n.11.

[15] *See* Brief for Intervenor-Respondent, *supra*, at 23.

[16] Not only did Trailways' witness testify as to how a grant of the application would cause systemwide harm to Trailways and increase Greyhound's dominance of the market, he also presented specific estimates of likely traffic diversions. J.A. 56-61.

(Pet. App. 22).[17] Rather, the court of appeals concluded only that the Commission's findings failed clearly to reveal "whether the Commission understood the nature of Trailways' arguments and considered them in balancing the interests involved." Pet. App. 10. Thus, the court narrowly held that Trailways' argument—that a grant to Greyhound (a "near-monopolist") would harm vulnerable competitors contrary to the public interest—did not get the "careful attention" from the ICC which it deserved. Pet. App. 18.

As the court of appeals found, "it is not at all clear that the Commission actually did look at systemwide harm to any degree." Pet. App. 11. In its only reference in the final decision to systemwide harm, the Commission held that it "may not be considered, for this issue was not raised prior to the time this proceeding reached the petition [for administrative review] stage." Pet. App. 32. The court of appeals accurately observed that this finding was clear error. Pet. App. 14.[18] The court noted further that other conclusory statements on this issue by both the Commission and its subordinate review board[19] avoided Trailways' essential argument that, notwithstanding the benefits of the proposed service, long-run competition in the industry would not be promoted by a grant of Greyhound's application. *Id.* While emphasizing that wherein the public interest ultimately lies was not the issue before the court, the District of Columbia Circuit concluded that the Commission's "incomplete analysis" of the public interest was arbitrary and capricious. Pet. App. 22-23.

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[17] The court observed, of course, that Trailways' efforts to build a record were frustrated by the agency's refusal to accept supplemental evidence and its erroneous holding that it lacked the power to take official notice of relevant comments filed in a related proceeding. Pet. App. 20.

[18] Trailways raised this issue in its initial evidentiary submission to the review board. *See* J.A. 60-61.

[19] The review board's finding on this issue—that it was "unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely affect either [Trailways Arkansas, Inc.] or its parent, Trailways" (Pet. App. 39-40)—was correctly found by the court of appeals to be "conclusory" and lacking in any articulated basis. Pet. App. 12. *Accord* C&H Transp. Co. v. ICC, 589 F.2d 565, 571-73 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

2. The agency erred in finding that it lacked the power to take notice of comments filed by Trailways in a pending ICC proceeding

The court of appeals also correctly found that the Commission's rejection of Trailways' evidence of anticompetitive systemwide harm—in the form of comments which it had recently filed in a related rulemaking proceeding pending before the Commission[20]—was plain error. Pet. App. 20-22. Although the Commission held that it "may not give consideration" to evidence contained in the records of other proceedings (Pet. App. 31), the court of appeals properly held that the decision of this Court in *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-30 (1946), as well as the Commission's own precedent,[21] recognize an agency's power to consider such evidence as long as all parties in the case at bar were also parties to the other proceeding. Because both Greyhound and Trailways were parties to the MC-133 proceeding from which record Trailways sought official notice, the court properly concluded that the Commission "was clearly wrong in concluding simply that it had no power to notice it." Pet. App. 22.

Hence, petitioner's arguments concerning the evidentiary value of the subject comments and its suggestion of possible grounds upon which the agency could have chosen not to consider the MC-133 evidence (Pet. App. 21-23), are wide of the mark. As the court of appeals found, the Commission's

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[20] The comments, filed in Ex Parte No. MC-133, *supra* note 4, contained "an exhaustive analysis of the interdependence of the various segments of the Trailways and NTBS route systems . . . [and] addressed the structure of the intercity bus industry and Greyhound's competitive advantages . . . which intensifies its capacity to accomplish substantial traffic diversions from its weaker competitors such as Trailways." Pet. App. 20. As the lower court noted (Pet. App. 19), that rulemaking proceeding has been "suspended" by the Commission in anticipation that Congress is about to enact comprehensive legislation that would substantially alter entry standards for the motorbus industry. *See* Bus Regulatory Reform Act of 1982, H.R. 3663, 97th Cong., 2d Sess., 128 Cong. Rec. S7699-7708 (daily ed. June 30, 1982).

[21] *See, e.g.*, Airfield Serv. Co., Ext.—Bradley Int'l Airport, 121 M.C.C. 765, 778 (1975).

decision in this case was *not* an exercise of its discretion one way or another:

> [I]t was bottomed squarely upon a statement and apparent belief that the ICC *could not* lawfully notice the record in the other proceeding. In this it was clearly wrong.

Pet. App. 21 (emphasis in original). Thus, the court properly found, under the arbitrary and capricious standard, that the Commission had committed a clear error of judgment and it remanded the case so that the agency could exercise its "discretionary prerogative." Pet. App. 22.

B. The Court of Appeals Did Not Intrude into Areas Committed to Agency Discretion

Contrary to petitioner's claims (Pet. 13-20), the court of appeals did not invade the ICC's policy domain, ignore Trailways' burden of proof, or improperly interfere with the Commission's procedural discretion.[22] Indeed, it is instructive to note that the Commission, whose policy standards and procedures are alleged by petitioner to have been undermined, has not sought further review of the court of appeals' decision.

1. The decision of the court of appeals is consistent with the ICC's current licensing policies

The court of appeals approvingly acknowledged the criteria which traditionally have governed ICC determinations as to public convenience and necessity[23] and noted that the

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[22] There is no merit to petitioner's claim that the court of appeals' decision conflicts with the admonitions of this Court against "judicial intrusion" into areas of an agency's procedural discretion. Petitioner's reliance in this regard on FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), and Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), is misplaced. The court of appeals remanded the ICC's decision not because the agency failed to follow the court's notion of the proper procedures, but rather because the Commission's findings did not reveal that it properly considered all of the relevant factors. Indeed, unlike *Listeners Guild* and *Vermont Yankee*, the court's remand in this case was based on substantive, not procedural, errors by the agency.

[23] The decision below not only recognized the Commission's long-established guidelines in Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936), but also noted that the Commission is entitled to broad discretion in balancing the competing interests involved. Pet. App. 7-8.

Commission recently, in its MC-121 proceeding,[24] "has adopted a policy that competition is to be given more weight" in the evaluation of applications for new route authority (Pet. App. 15). The court had no quarrel with these recent, judicially approved policy changes by the ICC. *Id.* n.48. Rather, the court held that Trailways presented sufficient evidence, even under the more exacting burden imposed on protestants by the MC-121 policies, to require the ICC adequately to explain how it balanced *all* of the competing factors.[25] Pet. App. 13-14. Where the Commission grants an application for new route authority without adequately explaining why protestants' allegations of harm are insufficient, it is the duty of a reviewing court to order a remand so that the agency properly may consider the issue. *See Argo-Collier Truck Lines Corp. v. United States*, 611 F.2d 149, 155 (6th Cir. 1979); *Campbell Sixty-Six Express, Inc. v. ICC*, 603 F.2d 1012, 1014 (D.C. Cir. 1979).[26]

There is also no merit to the argument (Pet. 17-20) that the court of appeals engaged in "judicial legislation" by holding that the ICC is required to evaluate the issue of harm in the context of "a market structure of which [it] should be expertly aware and which Trailways should therefore not be bound to 'prove' before using it as a basis for its argument." Pet. App. 16. The decision of the court of appeals simply recognized that the

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[24] Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation* (Pet. App. 59).

[25] The court observed that the assumption underlying the MC-121 proceeding's increase in a protestant's burden is that an application for expanded route authority is procompetitive "in the great majority of cases, but not necessarily in all." Pet. App. 15. Thus, the court cautioned that the ICC should not become "so enamored of procedural rules regarding burden of proof" that it strays from its statutory goals, including its duty to encourage sound economic conditions among carriers and to prevent destructive competitive practices. *Id. See* 49 U.S.C. § 10101(a) (Supp. IV 1980).

[26] In a case where the applicant dominates its market and may be able to inflict harm on its competitors, the court properly noted that the Commission should undertake a "careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." Pet. App. 19 (emphasis in original). Indeed, the Commission's MC-121 Policy Statement states that "more emphasis would be given to the benefits of healthy competition." Pet. App. 59.

intercity bus industry is uniquely dominated by Greyhound—a fact which the Commission itself has acknowledged.[27] Thus, the court correctly observed that because Greyhound has "a real ability to inflict harm on its competitors," Trailways' claims of adverse consequences deserve "especially careful attention" by the Commission. Pet. App. 17-18.[28] In short, the court of appeals merely pointed to the ICC's traditional duty adequately to consider the issue of adverse impact in the context of a licensing case involving an applicant which already dominates its market.[29]

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[27] *See* California Parlor Car Tours Co.—Purchase—The Greyhound Corp., 127 M.C.C. 343, 352 (1978), *modified*, 127 M.C.C. 605 (1979). As one commentator recently has noted:

> The intercity bus industry, however, differs in one major respect from trucking and airlines. It is dominated by one carrier, Greyhound Lines, Inc. . . . .

Cutler, *Antitrust and Deregulation: The Usefulness of Section Two of the Sherman Act in Restraining Anticompetitive Behavior in the Intercity Bus Industry*, 49 ICC Prac. J. 33, 33 (1981).

[28] This Court previously has recognized Greyhound's capacity to engage in predatory practices against its competitors. *See* Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 337 (1978); *see also* Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980); United States v. Southwestern Greyhound Lines, Inc., 1953 Trade Cas. (CCH) ¶ 67,470 (N.D. Okla.); United States v. Greyhound Corp., No. 57-01107 (N.D. Ill. June 27, 1957).

[29] The failure of the Commission's decision to reflect that adequate consideration was given in this adjudicatory proceeding to the full impact of a grant to Greyhound is not excused by the ICC's subsequent legislative statement that it does not favor the adoption *by Congress* of a "two-tier approach" whereby Greyhound's ability to gain new authority would be statutorily curtailed so that other carriers could gain larger market shares. *See* Pet. App. 90-92. Contrary to petitioner's claim (Pet. 15), this statement was issued nearly six months after the Commission's final decision and the filing of the petition for judicial review and, in any event, cannot relieve the agency of its legal obligation adequately to consider the *full* competitive consequences of a grant to the market-dominant Greyhound where that issue is appropriately raised in an adjudicatory proceeding.

2. The court's remand instructions preserve the agency's discretion to ascertain the validity of Trailways' arguments

Petitioner's arguments as to the allegedly "intrusive" nature of the court of appeals' remand instructions are unpersuasive. The court of appeals was careful not to intimate any view as to the merits of Trailways' arguments regarding the potential harm precipitated by a grant of authority to Greyhound. The court merely instructed the ICC to assess "the structure of the bus market and determin[e] if there is any detriment to public interest arising from the incremental impact on Trailways' competitive position of granting Greyhound an authority which, in all other respects, seems quite reasonable." Pet. App. 18. The court also instructed the ICC to use its discretionary prerogative to determine if it should take official notice of the comments offered by Trailways. Neither of these instructions can possibly be characterized as intrusive or complex.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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